

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

IN RE:	)	
	)	
HAMMOND-WHITING MEDICAL	)	CASE NO. 05-61377 JPK
CENTER, LLC,	)	Chapter 11
Debtor.	)	
*****	)	
HAMMOND-WHITING MEDICAL	)	
CENTER, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADVERSARY NO. 05-6224
	)	
WILLIAM GRUENBERG,	)	
	)	
Defendant.	)	

ORDER REGARDING PENDING MOTIONS

This adversary proceeding was initiated by the plaintiff's complaint filed on October 17, 2005. On December 20, 2005, the defendant filed a motion to dismiss the adversary proceeding, and a memorandum in support of that motion. On January 4, 2006, the Court entered an order with respect to the motion to dismiss and memorandum, which provided that the 30-day response period provided by N.D.Ind.L.B.R. B-7007-1 would not commence to run until service of the motion and memorandum had been made upon the plaintiff's counsel. On January 11, 2006, the defendant filed a motion to dismiss with a certificate of service, and on January 12, 2006, the defendant filed its memorandum in support of its motion to dismiss with a certificate of service. The plaintiff has not responded to the motion to dismiss.

On January 31, 2006, the plaintiff's counsel filed a Motion for Leave to Amend Complaint, which requested that the Court grant it leave to file an amended complaint attached as an exhibit to that motion, and to then order the defendant to answer the amended complaint within ten days of the entry of the Court's order allowing the filing. For some reason unknown to the Court, this motion appears to have fallen through the cracks, and no order was entered

with respect to it. The defendant did not respond to this motion.

On April 6, 2006, the plaintiff, by counsel, filed a Motion for Entry of Default Judgment. This motion asserts in essence that the amendment of the complaint was effected pursuant to Fed.R.Bankr.P. 7015/Fed.R.Civ.P. 15(a), which allows a party to amend a pleading "once as a matter of course at any time before a responsive pleading is served". The motion thus essentially claims that default judgment is appropriate because the defendant has failed to respond to the amended complaint within the time limitation provided by Fed.R.Civ.P. 15(a). On April 10, 2006, the defendant filed a response to the plaintiff's Motion for Entry of Default Judgment.

The plaintiff is correct that a motion to dismiss is not a "responsive pleading" which bars a plaintiff's amendment of a complaint as a matter of right under Rule 15(a); *Car Carriers, Inc. v. Ford Motor Company*, 745 F.2d 1101, 1111 (7<sup>th</sup> Cir. 1984). Thus, the plaintiff would have been entitled to file an amended complaint as a matter of right without seeking leave of the Court, and the filing of that complaint would have mooted the Motion to Dismiss which the defendant filed in response to the original complaint. However, the plaintiff did not choose this course; rather, the plaintiff sought an order of the Court authorizing it to file an amended complaint, a motion which has yet to be granted by the Court. Additionally, the amended complaint has not been filed as a separate pleading, but rather only as an attached exhibit to a motion, and therefore the amended complaint upon which the plaintiff premises its Motion for Default Judgment has actually yet to be filed of record as a pleading. In his response to the plaintiff's Motion for Entry of Default Judgment, the defendant states that he has no objection to the filing of the amended complaint, and the Court thus finds that the plaintiff's motion for leave to file that complaint should be granted. A separate order will be entered to that effect, and thus the defendant's Motion to Dismiss filed on January 11, 2006 will be mooted by the amended complaint.

Based upon the foregoing, the Court finds that the plaintiff has never been granted leave to file an amended complaint, and thus that the premise of the Motion for Entry of Default Judgment cannot be sustained.

IT IS ORDERED that the plaintiff's Motion for Leave to Amend Complaint will be granted by separate order.

IT IS FURTHER ORDERED that the defendant's Motion to Dismiss filed on January 11, 2006 will be mooted by the filing of the amended complaint.

IT IS FURTHER ORDERED that the plaintiff's Motion for Entry of Default Judgment filed on April 6, 2006 is denied.

IT IS FURTHER ORDERED that upon the filing of a timely answer or other response to the amended complaint, the Court will set a preliminary pre-trial conference in this adversary proceeding.

Dated at Hammond, Indiana on May 24, 2006.

/s/ J. Philip Klingeberger  
J. Philip Klingeberger, Judge  
United States Bankruptcy Court

Distribution:  
Attorneys of Record